Enforcing the Duty to Arbitrate Claims Arising Under a Collective Bargaining Agreement Rejected in Bankruptcy: Preserving the Parties’ Bargain and National Labor Policy

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In the Bildisco case the U.S. Supreme Court held that a collective bargaining agreement is an executory contract which may be rejected by a debtor in bankruptcy proceedings. Moreover, the Court held that the agreement becomes unenforceable after filing of the bankruptcy petition and, if rejected, remains unenforceable. The 1984 amendments to the bankruptcy laws alter the result reached in Bildisco, but not its underlying rationale. Prior to Bildisco the lower courts had held that the duty to arbitrate contained in a rejected contract remained enforceable at the discretion of the bankruptcy court. This Article discusses whether, in view of Bildisco and the 1984 amendments, that duty to arbitrate is still enforceable. The author concludes that it is, and that generally the bankruptcy court should direct the parties to arbitrate claims arising from the rejected agreement.

INTRODUCTION

Under the Bankruptcy Code,† the bankruptcy court has plenary jurisdiction to determine claims for or against the bankrupt estate. Alternatively, however, the court has authority to approve agreements between the estate and the estate’s creditors for compromise or settlement of claims. The federal bankruptcy rules promulgated under the

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1. Codified as amended at 11 U.S.C. §§ 101–1174 (1982 & Supp. II 1984) [hereinafter referred to as the Code]. The Code was enacted as the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978), and replaced the Bankruptcy Act of 1898. The Code contained many changes in the bankruptcy laws, but the general principles and procedures were carried over. Therefore, unless indicated, decisions cited herein which arose under the 1898 Act applied statutory requirements which were carried over or were not changed in a manner significant here.
Code provide for this in Rule 9019, which addresses "Compromise and Arbitration."

With regard to arbitration, the rule provides that "[o]n stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration." The Code thus explicitly encourages alternatives and voluntary methods of dispute resolution, either by the parties in compromise (settlement) negotiations or by a third-party arbitrator. When negotiations are undertaken, many features of a settlement typically are not publicly examined by the courts. The reported bankruptcy decisions demonstrate, however, that wide latitude is given to the parties to settle as long as the interests of all parties are protected.

Demonstrating that arbitration also has been an effective method of resolving disputes in bankruptcy is rendered difficult by a number of factors. Awards issued exclusively as a result of bankruptcy court referral of issues to arbitration obviously would comprise a tiny fraction of the thousands of arbitration awards issued annually in the nation and usually not published. Nonetheless, it is the assumption of this Article that arbitration is utilized in bankruptcy proceedings. This will be illustrated by bankruptcy and higher court rulings referring issues to arbitrators.

Bankruptcy related arbitration may occur only in minor part from referrals as a result of bankruptcy court approval of stipulations to arbitrate entered into under Rule 9019(b) during bankruptcy proceedings. Most of the reported arbitration referrals enforce a duty to arbitrate contained in a contract with the debtor at the time the debtor filed the petition for bankruptcy. Those referrals enlist the bankruptcy court in a strong and growing national policy of encouraging and enforcing contractual commitments to private arbitration of disputes—both commercial and labor—as an alternative to resolution in adversarial and costly public proceedings. That policy has an added dimension in the context of labor arbitration under collective bargaining agreement provisions which commit the union and the employer to arbitration of disputes arising under the contract. In that context enforcement of the contractual

2. Bankr. R. 9019(c), (codified at 11 U.S.C. § 9019(c) (Supp. II 1984)).
3. Id.
5. Awards by commercial arbitrators under ordinary business contracts are generally not accompanied by an opinion or published. That practice does not prevail in labor arbitration, but even there “[o]nly a tiny fraction of arbitration decisions are submitted for publication and only a tiny fraction of those submitted are published.” Feller, The Remedy Power in Grievance Arbitration, 5 Indus. Rel. L.J. 128, 152 (1982). The limited submission of labor arbitration awards for publication reflects the position of the National Academy of Arbitrators (NAA). Rule 2-C-1-c of the NAA’s Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provides that an arbitrator should not “make public an award without the consent of the parties.” 40 Arb. J. 64 (Sept. 1985).
duty to arbitrate also advances a national labor policy of encouraging voluntary and peaceful resolution of labor-management disputes.

Bankruptcy may create an opportunity for the debtor to avoid a contractual duty to arbitrate. Under the Code, a company going into bankruptcy may, upon proper showing, "reject" contracts entered into prior to filing the bankruptcy petition and not yet fully performed. The result is to relieve the debtor of further performance except for pre-bankruptcy claims vested under the contract and damage claims for rejection and nonperformance. These claims may be presented to the bankruptcy court as claims against the bankrupt estate. Periodically in bankruptcy proceedings a rejected commercial contract contains provisions for binding arbitration of claims. The creditor or the bankrupt company may take the position that all claims arising under the contract should be submitted to an arbitrator. The lower courts generally have enforced the duty to arbitrate where performance of that duty has not interfered with the bankruptcy court's exercise of its responsibilities.

A company filing for bankruptcy may also be permitted to reject a collective bargaining agreement which provides for arbitration of claims under the contract. The "creditor" in such cases is the union signatory. Unions have asserted that claims under the labor contract remain subject to the contract's arbitration provisions. Here, too, lower courts generally have held that the duty to arbitrate survives the rejection and should be enforced if arbitration is compatible with the bankruptcy court's functions.

However, the issue of arbitrating under a rejected collective bargaining agreement has been overshadowed by the threshold question of whether such agreements are even subject to rejection under the Code. Predictably, employee representatives have argued that rejection would be contrary to the nation's labor laws, whose policies should prevail. Alternatively, the unions have argued that collective bargaining agreements are only subject to rejection in exceptional circumstances and under stringent standards. The lower courts have held that the Code provides for rejection of collective labor contracts. For over two decades, however, the courts have been in conflict over the rejection standards to be applied.

The Supreme Court resolved that conflict recently in *NLRB v. Bildisco & Bildisco.* The Third Circuit in *Bildisco* had held that a collective bargaining agreement is an executory contract, and that the rejection of such agreements is authorized by the Code and not qualified by the federal labor laws. The court had also held that the test for rejection is a showing by the debtor that the agreement is burdensome to the estate and that the equities balance in favor of rejection. As detailed hereinaf-

ter, the Supreme Court affirmed these holdings but with certain clarifications of the applicable rejection standard.

In *Bildisco* the Supreme Court went on to hold that an employer's obligation under labor statutes to comply with a collective bargaining agreement terminated upon filing of the bankruptcy petition. The Court thus sustained the debtor's claim that unilateral departure from the agreement after filing the petition is permitted. The Court rejected the contention made by the nonemployer parties that the statutory duty to abide by the agreement subsisted until the bankruptcy court approved the company's request for rejecting the agreement. This holding rests on the rationale that, under the Code, when rejection is approved the unenforceability of the contract dates back to the filing of the bankruptcy petition.

The criticism immediately leveled at *Bildisco* included the charge that this rationale could mean that upon filing of the bankruptcy petition the company no longer has the duty to abide by the grievance and arbitration provisions in the collective bargaining agreement. Whether this result obtains depends upon the interpretation given to both *Bildisco* itself and the legislative response to *Bildisco*. For within months after the Supreme Court decided *Bildisco*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984. That legislation's original and major impetus was the crisis created by an earlier and unrelated decision of the Supreme Court which found unconstitutional the Code's 1978 grant of broad judicial power to bankruptcy judges. Congress took that occasion, however, both to amend many provisions in the Code and to add a new section 1113 which clearly overruled aspects of *Bildisco*.

As hereinafter spelled out, section 1113 largely codified the standards for rejection imposed by *Bildisco*. However, the section eliminates the right of a debtor under *Bildisco* to cease performing a collective bargaining agreement upon filing of a bankruptcy petition. Section 1113 requires, except in certain circumstances, continued performance pending rejection, which may be granted only after completion of a two-step process. The first step requires the debtor, after filing the petition, to make a

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proposal to the union for modifications in the agreement that are necessary to permit reorganization and to protect all affected parties. The debtor and the union are required to confer in good faith over the proposal. This step must be completed before filing a request to reject the agreement. The second step requires that, before approving rejection, the bankruptcy court must find that the debtor has complied with step one and that the union refused to accept the debtor's proposal without good cause.

Like *Bildisco*, section 1113 does not address the status of the arbitration provisions in a collective bargaining agreement which the debtor is permitted to reject. The position taken in this Article is that *Bildisco* did not intend to disturb lower court decisions enforcing a duty to arbitrate under contracts rejected in bankruptcy. Also taken is the position that section 1113 and its legislative history implicitly support the view that the contractual duty to arbitrate survives rejection in bankruptcy of the contract which contained that duty. To advance those positions account first must be taken of the scope and importance of a national policy of encouraging arbitration as an alternative method of resolving contract disputes.

I

A NATIONAL POLICY OF ENCOURAGING COMPLIANCE WITH AGREEMENTS TO ARBITRATE

A. Arbitration Under Commercial Contracts and the Federal Arbitration Act

Throughout our history the deficiencies of legal institutions have often inspired a search for alternative methods of dispute resolution. The first generation of New England colonists brought from England a conviction to resolve their conflicts outside the legal system. Community leaders espoused a moral obligation to submit disputes to their paternalistic mediation. If mediation failed, other methods were used to avoid litigation. For example, a Boston town meeting in 1635 directed that no congregation members could litigate unless there had been a prior effort at arbitration—an ancient method of settlement in which the disputants select an impartial decisionmaker who is knowledgeable about their kind of dispute, and agree to accept the decision as final and binding.\(^\text{10}\)

In the development of English common law, however, an enforceable duty to arbitrate a dispute generally arose only in mutually binding promises (a contract) to arbitrate an existing dispute. The state and federal courts adopted the common law rule that contract provisions to ar-

\(^{10}\) See Auerbach, *Alternative Dispute Resolution? History Suggests Caution*, 28 B.B.J. 37 (May-June 1984) (relating a 1640 Puritan dispute over a carpenter’s fee in which the unpaid carpenter and the house owner chose other carpenters to arbitrate the dispute).
bitrate future disputes which arise under the contract are not specifically enforceable by a court decree; such provisions were deemed contrary to public policy because they prospectively deprived the courts of jurisdiction over controversies they would normally hear and determine.

In the United States Arbitration Act of 1925\(^1\)\(^1\) the federal government followed the lead of some states by abolishing that common law rule regarding many commercial disputes in the federal domain. This statute has been periodically amended as the "Federal Arbitration Act."\(^2\) Section 2 of the Act establishes a federal right to the equitable remedy of specific performance of a provision to arbitrate controversies arising under a contract or transaction in any "maritime transaction" or a "contract evidencing a transaction involving commerce." Written provisions to arbitrate existing disputes are equally valid and enforceable if they arise out of such transactions or contracts.\(^3\)

The Federal Arbitration Act is an exercise of Congress' paramount power to regulate interstate and foreign commerce, as well as maritime matters. The Act does not extend to all contracts entered into by industries subject to those regulatory powers. However, its extension to all transactions involving commerce or maritime matters entails wide application and indicates a strong federal policy of enforcing a promise to arbitrate as an alternative to court litigation.\(^4\)

One feature in particular of the Federal Arbitration Act enhances its implementation and its arbitration-supportive policy. Section 3 provides that if a suit is brought in a federal court on a matter falling within an arbitration agreement covered by the Act, the court must stay the trial of the suit until the matter has been arbitrated.\(^5\) Section 4 effectuates this policy by providing that a federal court must grant a request for an order to arbitrate against a party who refuses to comply with an arbitration agreement.\(^6\)

Another significant feature of the Federal Arbitration Act was enunciated by the Supreme Court in its recent decision in \textit{Southland Corp. v. Keating}.\(^7\) The Court held that section 2 of the Act establishes a national policy favoring arbitration and requiring parties to honor arbitration agreements, and that this policy constitutes federal substantive law, applicable in both federal and state courts. Emphasizing that only an esti-

\(^{11}\) Codified at 9 U.S.C. §§ 1-14, 201-208 (1982).
\(^{12}\) \textit{Id.}
\(^{13}\) \textit{Id.} § 2.
\(^{16}\) \textit{Id.} § 4.
mated two percent of all civil litigation is brought in federal courts, the Court held that section 2 preempts a state law which requires state court resolution of claims under agreements involving transactions in commerce (hence under the Federal Arbitration Act's coverage) and containing an agreement to arbitrate. To hold otherwise would "encourage and reward forum shopping," and would frustrate congressional intent to place an arbitration agreement "upon the same footing as other contracts, where it belongs."


The foregoing briefly sketches what is actually the long history and slow development of a now well established national policy of arbitrating commercial disputes as an alternative to court litigation. Labor-management arbitration, the primary focus of this article, is much less deeply rooted in historical development. Most of its formulation and growth coincide with the enactment of laws establishing a right of employees to select a union for collective bargaining. Exercise of that right may lead to negotiation of a collective bargaining agreement. The contract negotiated may contain provisions for filing grievances based on a claim under the contract, and for the disappointed grievant to obtain arbitration of a denied claim.


19. According to a spokesperson for the American Arbitration Association, "more commercial claims are arbitrated than tried before a jury." Meyerowitz, The Arbitration Alternative, 71 A.B.A.J. 78, 79 (Feb. 1985). This is not wholly a product of arbitration clauses in hundreds of thousands of sales and other commercial agreements. Through either legislative or court action state and local jurisdictions are increasingly utilizing, and sometimes requiring, court-annexed mediation or arbitration as an alternative to trial of civil lawsuits. The same is true at the federal level, whether by court rule or statute. For example, a 1982 congressional enactment provides for voluntary binding arbitration of patent and copyright claims. 35 U.S.C. § 294 (1982). See also Thomas v. Union Carboide Agricultural Prod. Co., 105 S. Ct. 3325, 3337-39 (1985). The phenomenal growth of alternative dispute resolution (ADR) is reflected institutionally by, for example, the formation of national and local ADR organizations and the growth of ADR curricula at business schools and law schools. See generally J.B. MARKS, E. JOHNSON & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION (1984); National Institute for Dispute Resolution, Court-Ordered Arbitration Issue: A Report on the First National Conference on Court-Ordered Arbitration, DISPUTE RESOLUTION F. (1985).

20. The focus here is on the grievance (or "rights") arbitration described above. It is a private process of adjudicating claims under collective bargaining agreements. The principles and authorities cited here, and the views expressed, do not extend to "interest" labor arbitration. As regards the employees of private employers, this is a rarely agreed upon alternative to the negotiation of an agreement. "Interest arbitration, involving the binding determination of contract terms, has some private sector roots, but is mainly a public sector phenomenon, developed in response to the legal prohibition against strikes by public employees." Grodin, Judicial Response to Public-Sector Arbitration, in B. AARON, J.R. GRODIN & J.L. STERN, PUBLIC SECTOR BARGAINING (1979), reprinted in P.
A governmentally guaranteed right to bargain collectively originated primarily in federal law for interstate industries, first with the Railway Labor Act\(^1\) in 1926, and for most other interstate industries in the National Labor Relations Act (NLRA), or Wagner Act, in 1935.\(^2\) Employee opportunity to negotiate collectively the right to arbitrate claims under a labor contract expanded the need for judicial enforcement of that right. The NLRA did not give the National Labor Relations Board (NLRB) general authority to enforce collective bargaining agreements, leaving that authority with the courts. Moreover, it was unclear whether the Federal Arbitration Act gave the courts authority to enforce an arbitration provision in a collective bargaining agreement. Section 1 of that 1925 statute excluded from its coverage the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."\(^3\) The lower federal courts have taken different views on whether that 1925 exclusion applies only to individual employment contracts or also to collective bargaining agreements. If collective agreements were excluded from coverage, then the enforcement of their arbitration provisions remained governed by the laws of the states. Many of them had not then abandoned the common law rule against enforcing a promise to arbitrate future contract disputes.

The uncertainty of the availability of forums to enforce collective bargaining agreements, including their arbitration provisions, was ultimately addressed by legislation which also, as interpreted, created the federal law of labor contracts. In 1947 Congress passed the Labor Management Relations Act (LMRA), or Taft-Hartley Act, which amended the NLRA.\(^4\) Section 301 of the LMRA vests jurisdiction in federal courts over suits for violation of contracts between a union and an employer in industries affecting commerce.\(^5\) In the groundbreaking Lincoln Mills case,\(^6\) a union brought suit in a federal court under section 301 to enforce an arbitration clause in a collective bargaining agreement. Among the employer's defenses was that in such suits state law was applicable, and did not provide for specific enforcement of a promise to arbitrate a future dispute. The Supreme Court held that section 301 au-

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25. Id. § 185.
thorized the federal courts to distill from the federal labor laws a body of substantive federal labor contract law. Furthermore, the Court held that under federal labor laws and policy, a promise to arbitrate disputes in a labor contract is specifically enforceable.

The Court in *Lincoln Mills* placed primary reliance on the legislative history of section 301, and other sections of the LMRA which expressly declare a national policy that methods agreed upon by the parties, including arbitration, are the desirable means for resolving labor disputes, including disputes arising under collective bargaining agreements. Commercial arbitration is grounded primarily in an exchange of mutual promises to forego court litigation. In *Lincoln Mills* the Supreme Court noted that in a labor contract the primary exchange is a union's promise not to strike in return for the employer's promise to resolve claims under the contract in grievance-arbitration procedures. "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."

Three years later in the *Steelworkers Trilogy* of 1960, the Supreme Court exalted the role of the arbitrator in national labor policy. These three decisions establish the ground rules to guide courts when called upon to enforce an arbitration agreement in a labor contract, or to enforce a labor arbitration award. As to the former, the Court held in the

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27. The Court subsequently held that although § 301 left the state courts with concurrent jurisdiction to enforce labor contracts, they must apply the principles of federal law developed under the *Lincoln Mills* case. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

28. The ruling on enforceability includes the Court's key holding that the federal court anti-injunction policy of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982), is not a bar to a federal court order requiring performance of a promise to arbitrate. Notably, the Court ultimately held that Norris-LaGuardia also is not a bar to federal court issuance of an injunction against breach of a no-strike clause in a collective bargaining agreement, where the strike dispute is subject to an enforceable duty to arbitrate in the agreement, under § 301. Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970).


30. *Lincoln Mills*, 353 U.S. at 455. The Court subsequently held that where a collective bargaining agreement contains provisions for arbitration of disputes but does not contain a no-strike provision, the contract should be read to include impliedly an obligation not to strike over disputes which are subject to arbitration. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962). A 1979 study indicated that 96% of collective bargaining agreements contain grievance-arbitration provisions. Most agreements also include no-strike (92%) and no-lockout (87%) provisions. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 15, 78, 79 (1979).

first of these cases that when the agreement is to arbitrate all grievances under the contract, the duty to arbitrate should be enforced as long as a grievance may fairly be read to arise under the contract. A court should not be concerned with the merits of the grievance, according to the Supreme Court, even if the claim appears frivolous. That issue is for the arbitrator's judgment, and "it was his judgment and all that it connotes that was bargained for." Courts, therefore, should not assess the substantive claim made under the contract—such as wages, seniority, and the like—but only whether there has been a promise to submit that dispute to an arbitrator.

In the second case in the Steelworkers Trilogy, the Court, while recognizing that submission to labor arbitration is a matter of voluntary agreement, held that section 301 and national labor policy require construing labor contracts in a manner most hospitable to arbitration. The presumptive exclusion from arbitration sometimes cited in commercial arbitration was deemed inapplicable. In labor arbitration "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Furthermore, the Court viewed labor arbitration as "a part of the continuous collective bargaining process." Unlike a commercial contract, a labor contract "is an effort to erect a system of industrial self-government." That complex and incomplete system must "be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement." Finally, the Court emphasized that it is this feature of a labor contract that informs the parties' selection of a labor arbitrator possessing specialized knowledge and experience which "[t]he ablest judge cannot be expected to bring" to a labor dispute.

The third case in the Steelworkers Trilogy establishes the standard for judicial authority to modify or to refuse to enforce an award. Here, too, the Court found that national labor policy favors judicial deference to the determination of an arbitrator who brings special knowledge and who was selected by the parties. A court should not review the merits of the award, but rather, the touchstone is whether the arbitrator exceeded the authority granted by the parties' agreement. This does not authorize an arbitrator to "dispense his own brand of industrial justice." Thus, while the arbitrator may look for guidance in, for example, industry custom and practice, "his award is legitimate only so long as it draws its

33. Warrior & Gulf, 363 U.S. at 578, 579, 582-83.
34. Id. at 580-81.
35. Id. at 582.
essence from the collective bargaining agreement."

Lincoln Mills and the Steelworkers Trilogy are the fountainheads of a national labor policy that favors adherence to commitments to arbitrate claims arising under collective bargaining agreements. For twenty-five years that labor policy has been nurtured and strengthened. A similar national policy with respect to commercial arbitration was established by the Federal Arbitration Act, which calls for mandatory arbitration of commercial disputes. These policies must be considered in determining both the effect of the Supreme Court's decision in Bildisco and that of the subsequent 1984 bankruptcy amendments on the duty to arbitrate claims under contracts rejected in bankruptcy. An analysis of Bildisco and the 1984 amendments must be preceded, however, by an examination of the relevant provisions of the Bankruptcy Code and the pre-Bildisco rulings which held that the duty to arbitrate survived rejection.

II
PRE-BILDISCO ARBITRATION UNDER EXECUTORY CONTRACTS REJECTED IN BANKRUPTCY PROCEEDINGS

A. The Standard for Rejection of Executory Contracts, Including Collective Bargaining Agreements

Chapter 11 of the Bankruptcy Code authorizes companies in financial trouble to rehabilitate themselves by reorganizing under the direction of the bankruptcy court. Under chapter 11, the "debtor," which denotes either a trustee designated by the bankruptcy court to operate the company or, alternatively, the company itself when it is authorized by the court to continue as a debtor-in-possession, has considerable leeway to restructure the business. A paramount provision for enabling debtors to avoid liquidation by reorganizing is section 365(a) of the Code. That section permits a debtor to assume or to reject executory contracts, subject in either case to the bankruptcy court's approval.

Section 365(a) applies as well to termination and liquidation of a business under chapter 7 of the Code. That is significant as regards commercial contracts involving, for example, enforceable but substantially unperformed (and therefore executory) obligations for the sale or

37. Id. at 597. Under common law a court generally could set aside an arbitration award on limited grounds only, such as fraud, partiality, gross procedural unfairness, or entry of an award in excess of the arbitrator's authority. The Federal Arbitration Act sets similar limits on judicial modification of an award in arbitration covered by that statute. 9 U.S.C. §§ 10-11 (1982).
38. 11 U.S.C. § 365(a) (Supp. II 1984). The section provides that with certain exceptions, "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." The term "trustee" may be read as "debtor" since chapter 11 gives a debtor-in-possession the rights given a trustee under the chapter. 11 U.S.C. § 1107(a) (Supp. II 1984).
purchase of goods. Performance of a collective bargaining agreement, however, is usually considered to be conditioned on the continuation of the business and need for a workforce covered by the agreement. It generally follows, therefore, that the question of whether a collective bargaining agreement should be assumed or rejected is academic when a business is terminated and liquidated. Accordingly, with rare exceptions, cases involving requests to reject collective labor contracts have involved chapter 11 reorganizations.

In recent years requests to reject unexpired labor agreements have become a familiar feature of chapter 11 reorganizations. While one observer notes that employers have been rejecting such agreements in reported cases for over forty years, business bankruptcy filings, including filings to reject labor contracts, increased sharply after 1978. The rapidly declining economy and recession of the early 1980's brought record numbers of bankruptcy petitions. This economic climate introduced an era of increasing management demand for concession bargaining. That demand is typically predicated on an assertion by the company of an inability to continue present operations under the cost and other disadvantages of fully performing the union contract. It has not been unusual for an employer who makes that demand to warn that the alternative is resort to the bankruptcy laws. If that eventuates, the employer typically seeks rejection of the labor contract on the basis of the disadvantages earlier invoked.

Continued and long term revitalization of the economy might not reduce that pattern. For example, if decline or at least restructuring of smokestack industries is inevitable, companies may seek to modify or to


abrogate their labor contracts.\textsuperscript{43} Continued deregulation of industries may also increase reliance on the bankruptcy laws for relief from the costs of collective bargaining agreements. This is suggested by the highly publicized resort of major airlines to bankruptcy reorganization and requests for rejection of labor contracts.\textsuperscript{44}

Requests to reject a collective bargaining agreement have raised a number of legal questions. Two have been of particular significance. The threshold question was whether such agreements are "executory contracts" under section 365(a). The Code provides no definition. The unions generally, and not surprisingly, argued that collective bargaining agreements are not covered by section 365 because they are not the equivalent of the ordinary commercial contracts contemplated by Congress. Nevertheless, a consensus developed in the lower federal courts that an existing collective bargaining agreement satisfies a description in the legislative history leading to enactment of the Code in 1978. There it is stated that an executory contract "generally includes contracts on which performance remains due to some extent on both sides."\textsuperscript{45}

The second question was whether rejection of a collective bargaining agreement conflicts with federal labor law and policy when rejection is approved under the same standard applied to ordinary commercial contracts. Where the debtor seeks to reject a commercial contract the standard is noncontroversial and rather straightforward, though its application may vary as to different kinds of contracts. In general the bankruptcy court should approve a rejection request if the debtor in good faith considers that nonperformance of an executory commercial contract will be in the best interest of the debtor's estate and its creditors. This is a "business judgment test" which focuses almost entirely on the benefit to the bankrupt estate. Minimal regard is given to the adverse impact of the rejection on other parties and interests.\textsuperscript{46}

Employee representatives strongly opposed the application of this rejection standard to collective bargaining agreements. They argued that

\textsuperscript{43} See Crandall, Anatomy of an Industrial Policy, Wall St. J., June 19, 1985, at 30. Another incentive for rejecting labor agreements could be the demise or restructuring of companies as a result of politically irresistible public demand for more stringent and costly environmental regulations in the area, for instance, of protection from acid rain.


\textsuperscript{46} See 2 COLLIER ON BANKRUPTCY §§ 365.01-.03 (15th ed. 1983).
the standard would permit routine rejection contrary to the terms and policies of the NLRA and other federal labor laws. The main goal of the NLRA is to encourage industrial peace by facilitating the negotiation of collective bargaining agreements.\textsuperscript{47} Once such agreements are entered into, a mid-term unilateral modification by either party of employment conditions fixed by the negotiations or provisions in the agreement is, apart from a possible contract breach, an unfair labor practice. Unilateral modifications violate a general duty to bargain over changes in terms of employment.\textsuperscript{48} Moreover, such unilateral changes violate the rights given to both unions and employers under section 8(d) of the NLRA. Among other things, that section prohibits mid-term modification or termination of the written terms of a collective bargaining agreement without the consent of both parties to the agreement.\textsuperscript{49}

Labor representatives also argued that such routine bankruptcy court approval of rejection of a labor agreement conflicts with the NLRA's guarantee of the rights of union and management to negotiate agreements of their own choice. This guarantee precludes the NLRB and the courts from imposing (or eliminating) agreed upon and permissible contract terms.\textsuperscript{50} Therefore, union representatives asserted, court approval of a debtor's rejection of a collective bargaining agreement constitutes a cancellation by the bankruptcy court of duly bargained and agreed upon contract benefits.

For the above reasons and others, argued unions, rejection of a collective labor contract under a mere business judgment standard thwarts the letter and the spirit of the labor statutes. Furthermore, they pointed to the Supreme Court's recognition, in the Steelworkers Trilogy, that a collective bargaining agreement is more than just an ordinary commercial contract. Labor urged, therefore, that the standard for rejection of labor contracts must be stringent enough to accommodate the labor laws. Employers generally responded that collective bargaining agreements were subject to the same rejection standard as ordinary commercial contracts. The bankruptcy courts tended to polarize around these two contrasting positions according to their respective sensitivity to labor's plea for a stricter standard for labor contracts or to management's plea for a uniform standard.

On review of bankruptcy court decisions the federal appellate courts usually held that there should be a stricter standard for rejection of a collective bargaining agreement than for commercial contracts but disagreed on what that standard should be. However, the polarization

\textsuperscript{47} 29 U.S.C. § 151 (1982).
\textsuperscript{49} 29 U.S.C. § 158(d) (1982).
around either a stricter standard for collective bargaining agreements or a uniform standard for all executory contracts surfaced in most of the considerable commentary the issue generated. This is exemplified by the forceful advancement of these divergent positions in two articles published in bankruptcy law's most prestigious law journal by prominent commentators soon after the Supreme Court had agreed to review the Third Circuit's decision in *Bildisco* and, presumably, to resolve the issue.\(^5\)

### B. Court-Directed Arbitration Under Rejected Contracts: Bohack and Other Cases

Prior to *Bildisco* the rejection of a collective bargaining agreement raised legal questions beyond those just described above. Among them was whether the obligation to arbitrate contained in such agreements survived the filing of the bankruptcy petition and approval by the bankruptcy court of rejection of the agreement. This issue may arise as to any executory contract subject to rejection in bankruptcy and containing an arbitration provision. Yet the issue has received relatively little attention.

Writing fifteen years ago, a commercial arbitrator observed that as a result of increasing use of commercial arbitration there were increasing instances when claims asserted in bankruptcy proceedings arose out of a commercial contract providing for arbitration of the claims. The writer concluded that there was an incipient but growing tendency by the courts to hold that the bankruptcy laws gave the bankruptcy courts discretionary authority to enforce the debtor's contractual right or duty to arbitrate contract claims. The qualification was that arbitration should not be directed where it would interfere with reorganization or the bankruptcy court's province to process and to prioritize all claims.\(^5\)

The cases cited by the above writer involved requests for arbitration—by either the debtor or a creditor—of both pre- and post-bankruptcy petition claims arising under contracts which had not been rejected in the bankruptcy proceeding. In those circumstances, bankruptcy and lower reviewing courts have held that directing commercial arbitration is within the sound discretion of the bankruptcy court. Increasingly the

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51. Bordewieck & Countryman, *supra* note 45, at 299-300, took the view that rejection of a collective bargaining agreement should be permitted only in extraordinary circumstances and, hence, there should be a presumption against approval of a rejection request. Shortly thereafter the same journal published an article taking sharp issue with that view, advancing instead the position that the rejection of a collective bargaining contract should be under the same "business judgment" standard applicable to all other types of executory contracts. Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANKR. L.J. 1, 19 (1984). As will be seen, in *Bildisco* the Supreme Court adopted neither view. *See* White, *supra* note 8, at 1202 n.102.

courts rely on a national policy of maximizing arbitration of contract claims.\textsuperscript{53}

Where the debtor \textit{has} successfully rejected a commercial contract, the courts have been more cautious in enforcing a contractual duty to arbitrate. For reasons explained below, upon rejection all claims under the contract are treated as pre-petition claims, including a damage claim which arises to compensate for rejection of the contract during the bankruptcy proceeding.\textsuperscript{54} Lower courts have recognized that the promise to arbitrate pre-petition claims may survive rejection and that the bankruptcy court has discretion to enforce that promise; furthermore, some courts have held unqualifiedly that rejection of the commercial contract did not affect the mandatory arbitration requirement in the rejected contract.\textsuperscript{55}

The courts’ position on the concept of survival of the duty to arbitrate under a rejected collective bargaining agreement is less definitively developed. This may be attributable to the infrequency, until recent years, of debtor rejection of labor agreements. Union opposition to application of the Bankruptcy Code’s rejection provisions to labor contracts may also have impeded development of the concept of survivability. However, none of the lower courts have appeared to hold that under the Code labor-management promises to arbitrate contract claims expire upon rejection of the collective bargaining agreement. Some courts have


\textsuperscript{54} See infra notes 72-73 and accompanying text.

\textsuperscript{55} Tobin v. Plein, 301 F.2d 378 (2d Cir. 1962). See Westbrook, supra note 53 at 618-26; \textit{In re Brookhaven Textile, Inc.}, 21 Bankr. 204 (Bankr. S.D.N.Y. 1982).
held, to the contrary, that such application of the bankruptcy laws is precluded because it would defeat a national labor policy favoring arbitration of disputes arising under collective labor contracts. This is best illustrated by the Second Circuit's decision in *Truck Drivers Local Union No. 807, International Brotherhood of Teamsters v. Bohack Corp.* That decision has invariably been the main focus of the sparse commentary on the arbitration issue. Moreover, that commentary has usually been made during examination of the broader issue of the appropriate standard for approving rejection of a collective bargaining agreement.

In the *Bohack* case, the Bohack Corporation and the union were parties to a collective bargaining agreement which provided for grievance and arbitration of contract disputes. The company filed for reorganization under chapter 11. Thereafter it discontinued grocery warehousing, began laying off its warehouse drivers, and purchased groceries directly from independent wholesalers. The union filed a grievance and ultimately obtained an arbitration award holding that Bohack's action violated the prohibition against subcontracting in the parties' collective bargaining agreement. The company refused to comply with the award and, at that juncture, applied to the bankruptcy court for rejection of the contract. The company also laid off its remaining warehouse drivers. The union again invoked the grievance and arbitration provisions of the contract. The union also brought suit in the federal district court where the bankruptcy was pending to enforce the award and to compel Bohack to comply with the contract's grievance and arbitration provisions.

Bohack took the position that after the bankruptcy petition was filed, a duty to arbitrate and entry of a valid arbitration award could arise only under a provision in a bankruptcy rule which spells out methods of compromise. Under that provision the bankruptcy court may refer issues affecting the estate to an arbitrator when the disputing parties enter a stipulation for binding arbitration of the issues. The district court agreed that the bankruptcy rule was controlling; therefore, the court vacated the arbitration award and remanded the question of whether to order arbitration under that rule to the bankruptcy judge, who also had to decide whether to approve Bohack's rejection of the parties' collective bargaining agreement.

56. 541 F.2d 312 (2d Cir. 1976).
58. Bohack was relying on Rule 919(b), the predecessor to a similar rule now embodied in Rule 9019, see *supra* note 2 and accompanying text. Both rules embody former § 26 of the 1898 bankruptcy act which, before being omitted during the amendment process, similarly authorized the bankruptcy court to approve agreed upon submission of controversies to binding arbitration. See *Bohack*, 541 F.2d at 319 n.11.
The union obtained an immediate appeal to the Second Circuit. That court reiterated previous holdings by it and other courts that a collective bargaining agreement is an executory contract subject to rejection. The court similarly adhered to previous holdings that the duty to arbitrate contract claims, including the claim for damages based on the rejection, survives both the bankruptcy petition and successful rejection of an executory contract. The court did not accept the argument that debtor authority for a "unilateral disavowal" of an arbitration promise in an executory contract is implicit in the bankruptcy rule described above, authorizing arbitration only upon stipulation of the parties during the bankruptcy proceeding.\(^{59}\) Citing previous judicial holdings, the court held that the intent of that rule is "to provide arbitration where no contractual arrangements exist. It does not supersede explicit contractual provisions."\(^{60}\)

The Second Circuit held, however, that the bankruptcy rule's requirement of court approval of a stipulation during bankruptcy proceedings for arbitration supported the lower court's determination that arbitration under the debtor's executory contract was required only if authorized by the bankruptcy court. For, "[i]n either case, the same rights of the creditors are involved and the obligation of the bankruptcy court to protect all concerned is the same."\(^{61}\) Consequently, the Second Circuit remanded the case to allow the bankruptcy judge to determine whether to approve Bohack's rejection of the parties' labor contract and whether to order arbitration pursuant to the contract's arbitration provisions.

On remand, the decision of the bankruptcy court, as later modified by the district court, approved rejection of the parties' labor contract. Under the Code, as described below, rejection is treated as a breach of the contract the day before the bankruptcy petition was filed. Accordingly, the court held that whether Bohack had breached the contract by subcontracting after filing the petition was a moot question. The contract claim to be arbitrated was the claim for damages for rejection. That claim, the court concluded, should be arbitrated. The court emphasized that, notwithstanding its plenary jurisdiction over claims against the estate, there is a "federal labor policy favoring arbitration 'as the means of resolving disputes over the meaning and effect of collective-bargaining agreements.'"\(^{62}\)

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59. Bohack, 541 F.2d at 319.
60. Id. (quoting Tobin v. Plein, 301 F.2d 378, 381 (2d Cir. 1962)).
61. Id. at 320.
The parties therefore were ordered by the district court to arbitrate in conformity with the rejected contract’s arbitration provisions. Damages to be determined included losses in pension, health insurance, welfare benefits and the value of lost seniority. The court refused to permit arbitration of whether the laid off employees should be reinstated, on the ground that, under the circumstances, such equitable relief would be contrary to permitting rejection of the contract.

Finally, the court held that the substance of the arbitration award would not be subject to review by the bankruptcy court. The court stated as follows:

There is no point to arbitration proceedings if a bankruptcy judge, lacking experience in the collective bargaining process, undertakes a plenary review of the arbitrator’s decisions concerning areas where the arbitrator’s knowledge and expertise are far superior. Once an award is made, however, its status and priority are questions for the special expertise of the bankruptcy court, which may then relegate the claims of the union to a proper place in the framework of the re-organization.63

The Second Circuit summarily affirmed the lower court’s holding, and the Supreme Court denied Bohack’s petition for review of that affirmance.64

In a line of cases since, the bankruptcy courts have applied principles enunciated in the Bohack cases to require arbitration of claims arising under labor contracts either assumed by the debtor,65 or successfully rejected.66 Whether the Supreme Court and congressional action cast doubt on those principles depends on the reading of Bildisco and the congressional amendments to the Code which Bildisco generated.

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64. See supra note 62.
III

BILDISCO AND THE RESULTING 1984 AMENDMENTS

A. The Bildisco Case

In Bildisco the Supreme Court resolved the main issues which had percolated for over two decades in the federal courts. The parties did not dispute that a collective bargaining agreement is an executory contract subject to rejection under section 365(a). The Court unanimously rejected the contrary view argued in the friend-of-court brief filed by the United Mineworkers of America. The Court also unanimously agreed with the uniform view of the courts of appeals that the standard for rejecting a collective bargaining agreement should be stricter than that applied to ordinary commercial contracts. But the Court refused to require a showing that a reorganization will fail unless the agreement is rejected, a standard applied by some courts of appeals. Rather, the Court adopted the less strict balancing standard followed by many of the lower courts and which the Third Circuit applied in Bildisco. Under that standard the debtor must "show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." In addition, "the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution."

In addition to the question of rejection standards, Bildisco also involved the issue of whether the debtor's failure to perform the collective bargaining agreement after filing a bankruptcy petition violated the NLRA. Both before and after filing the bankruptcy petition Bildisco had unilaterally modified the contract by ceasing to comply with various provisions, including wage, health, welfare, and dues check-off provisions. A debtor (or trustee) is an employer under the NLRA, and a debtor continuing to operate the bankrupt company must comply with that statute. Accordingly, the NLRB had held that Bildisco's post-petition unilateral modifications of the contract prior to bankruptcy court approval of rejection were an unlawful refusal to bargain. The NLRB remedy

68. Id. at 524.
69. Id. at 526. Emphasizing that a bankruptcy court is a court of equity, the Court held that it must balance the interest of the affected parties (debtor, creditors, and employees). This requires consideration of "the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmation and the hardship that would impose on them, and the impact of rejection on the employees." The balancing should take into account not just the degree but also the "qualitative differences" of the hardships. However, when considering the equities the bankruptcy court "must focus on the ultimate goal of Chapter 11" of rehabilitating the debtor. Id. at 527.
70. Id. at 526.
71. Id. at 534. See 29 U.S.C. § 152 (1), (2) (1982).
included an order to pay sums owing under the breached contract provisions described above. This raised squarely the issue of whether the filing of a bankruptcy petition permits the debtor to cease performing a collective bargaining agreement; or whether, as the NLRB maintained, until bankruptcy court approval of a rejection request the debtor may not modify the contract without complying with the NLRA’s general duty to bargain and section 8(d)’s obligation to adhere to the contract unless the union consents to modifications.

The Supreme Court split five to four on that issue. The majority opinion by Justice Rehnquist held that approval of the rejection request insulates the debtor from NLRA charges based on post-petition noncompliance with the contract. The majority reached this conclusion by reliance on chapter 11’s specifications of the effect of rejection of an executory contract. Section 365 provides that rejection operates as a breach of the contract for which a claim for damages may be brought, but specifies that the rejection constitutes a breach as of the date immediately preceding the filing of the bankruptcy petition. As a result, the claim for damages and all other claims arising under the rejected contract, including those based on noncompliance with the contract after the bankruptcy petition is filed, are treated as pre-petition claims. This means they must be filed with the bankruptcy court as a “proof of claim” against the estate, and subjected to the Code’s classification and priority as determined by the bankruptcy court.

At the time a bankruptcy petition is filed, there may be outstanding employee claims under a collective bargaining agreement which have not been liquidated in pending grievance, arbitration, or court proceedings. Recoverable damages caused by bankruptcy rejection of the agreement (including reduction of wages or loss of various fringe benefits such as severance, vacation, sick leave pay and pension benefits) are also unliquidated. However, under the Code the amount of an unliquidated claim must be estimated by the bankruptcy court as a step in determining the claim’s priority and the extent it will be paid when the estate is settled.

To assure bankruptcy court control of the estate for the above and other purposes, upon the filing of the bankruptcy petition the Code’s automatic stay provision enjoins the commencement or continuation of most suits outside the bankruptcy process, including actions on pre-petition contract claims. The bankruptcy court has discretion to lift the stay if it determines that an alternative method of liquidating a claim is

73. Id. § 502(g).
74. Id. § 502(c) (described in Bildisco, 465 U.S. at 530-31 n.12). See White, supra note 8, at 1179 n.32.
75. 11 U.S.C. § 362(a) (Supp. II 1984). The Code provides for certain exceptions to this rule, not germane to this discussion.
necessary to protect the interests of the creditors and would not prevent an effective settlement of the estate or reorganization of the debtor.\textsuperscript{76} Otherwise, however, the automatic stay broadly prohibits creditors from external liquidation of claims and preserves centralization of the claims process in the bankruptcy court.\textsuperscript{77} It follows, as Justice Rehnquist noted in \textit{Bildisco}, that after the bankruptcy petition is filed, the prescribed avenue for enforcing an executory contract against the debtor is in the administration of claims by the bankruptcy court.\textsuperscript{78}

The “necessary result” of the foregoing features of the Code and its rejection-related provisions, Justice Rehnquist concluded, is that “filing of the petition in bankruptcy means that the collective bargaining agreement is no longer immediately enforceable, and may never be enforceable again.”\textsuperscript{79} The contingencies implicit in this rationale are, of course, that the bankruptcy court may approve a debtor’s request to assume an agreement or may disapprove a rejection request. Either would make the agreement enforceable. On the other hand, the court may approve the agreement’s rejection, which then relates back to the day before the bankruptcy petition is filed. In the latter case by “operation of law” the agreement was never enforceable after the filing of the bankruptcy petition.\textsuperscript{80}

Justice Rehnquist’s conclusions provide the basis for the Court’s narrow five to four determination that a debtor does not violate its general bargaining duty or section 8(d) of the NLRA by unilaterally modifying contract terms after filing a bankruptcy petition and a request for rejection. Nonetheless, the key rationale for this narrow holding is an unqualified pronouncement that upon the filing of a bankruptcy petition a collective bargaining agreement, and presumably any executory contract, becomes an unenforceable contract and remains so, retroactively, if a rejection request is approved. Among the many questions this raises is whether this includes unenforceability of provisions in the contract which obligated the debtor to arbitrate contract claims. To the limited extent this issue has been addressed, commentators appear to agree that \textit{Bildisco}'s rationale may undercut a post-petition request for arbitration. They further agree that the \textit{Bildisco}-related portions of the 1984 amend-


\textsuperscript{78} \textit{Bildisco}, 465 U.S. at 530.

\textsuperscript{79} \textit{Id.} at 532.

\textsuperscript{80} \textit{Id.} at 533.
ements to the Code do not expressly reject Bildisco’s rationale as to post-petition unenforceability, much less address the question of post-petition arbitration.\(^8\)

**B. The Bildisco-Related 1984 Amendments: Section 1113**

As previously stated, the 1984 amendments mainly addressed non-labor-related changes in the Code.\(^8\) Those changes had been the subject of prolonged and sophisticated political debate that had begun long before Bildisco had been decided. Labor response to Bildisco, however, was immediate and vocal, as there was little doubt that the outcome of the decision was to improve significantly the ability of chapter 11 debtors to reject collective bargaining agreements. As a result of labor’s efforts, the amendments include provisions in a new section 1113 which clearly undo this outcome of Bildisco. Those provisions, however, do not alter the majority opinion’s analysis of the Code’s rejection mechanisms and the conclusions the Court derived from them.

In essence, section 1113 constitutes a compromise on the issues resolved by Bildisco’s two ultimate holdings: the balancing of equities standard for rejection of a collective bargaining agreement and the permissibility of unilaterally modifying the agreement after filing a bankruptcy petition and a rejection request. That compromise adopts aspects of those holdings. Section 1113 supplants section 365(a) as the method for assuming or rejecting a collective bargaining agreement.\(^8\) The section then sets forth guidelines which the debtor must follow before requesting bankruptcy court approval for rejection. Reflecting Bildisco’s requirement of an effort to negotiate voluntary changes in the agreement, under section 1113 the debtor first must make a proposal to the union setting forth modifications deemed “necessary” to permit reorganization and to assure “fair and equitable” treatment of all affected parties, including creditors.\(^8\) The debtor must provide the unions with the information necessary to evaluate the proposal.\(^8\) The debtor may then file an application for rejection, and the bankruptcy court must conduct a hear-

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\(^8\) See *supra* notes 7-8 and accompanying text.


\(^8\) Id. at (B). Subsection (d)(3) authorizes the bankruptcy court to enter protective orders to prevent union disclosure of information which compromises the debtor’s position with respect to creditors.
Pending the hearing the parties must meet and "confer in good faith" about reaching agreement on modifications. If no agreement is reached, and the hearing proceeds, the bankruptcy court must rule on the application to reject within thirty days after the hearing commenced unless the debtor and the union agree to extend that time. If the court fails to rule within that specified time, the debtor may then "terminate or alter any provisions in the collective bargaining agreement pending the ruling of the court on such application."

The bankruptcy court must apply a three-prong standard for approving rejection. The debtor must have complied with the modifications proposal requirements outlined above. The union must have refused to accept the proposal "without good cause," which is not defined. Finally, and again reflecting Bildisco, the debtor must have shown that "the balance of the equities clearly favors rejection of such agreement." The substantive provisions of section 1113 conclude with the specification that nothing in the section shall be construed "to permit a trustee [debtor] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."

This assures that section 1113 must be construed as overruling Bildisco's five to four holding that unilateral modifications before bankruptcy court approval of rejection do not violate the NLRA.

Section 1113 forestalls unilateral modification of a collective bargaining agreement pending bankruptcy court approval of a debtor's rejection application. Presumably this requires adherence to all obligations in the agreement, including an obligation to arbitrate from the filing of the bankruptcy petition to approval of rejection. However, owing to section 1113's expedited procedures and statutory deadlines, the hiatus

86. Id. at (d)(1). The bankruptcy court can extend the hearing date for up to seven days where the circumstances of the case require such extremes. Grants of additional extensions require the concurrence of the debtor and the union.

87. Id. at (b)(2). Any time after filing a rejection application the debtor may seek emergency relief from the agreement under § 1113(e). That section authorizes the bankruptcy court to permit the debtor to make interim changes in employment conditions covered by the agreement if the debtor shows they are "essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate. . . ." The section specifies that such changes do not moot the application for rejection.

88. Id. at (d)(2).
89. Id. at (c)(1).
90. Id. at (c)(2). The conferees apparently believed that "good cause" should be narrowly interpreted and should be based on "facts directly resulting from the contract between the debtor and his employees" and should be unrelated to "contracts with unions other than those immediately before the court."
91. 11 U.S.C. § 1113(c)(3) (Supp. II 1984). This requirement will undoubtedly be read to require balancing of the considerations spelled out by the Supreme Court in Bildisco. See supra note 69.
should generally be of short duration—perhaps six to eight weeks. This provides little opportunity for completion of arbitration invoked prior to filing of the bankruptcy petition. As to grievances and claims filed after the petition, it is unlikely that the hiatus period would ever be sufficient to permit exhaustion of the grievance procedure and completion of arbitration. This will surely be true if, as appears to be the case, section 1113 does not alter lower court holdings that the automatic stay is applicable to arbitration proceedings. This means that the party to the collective bargaining agreement who seeks to continue pre-petition arbitration or to commence arbitration after the petition must persuade the bankruptcy court to lift the automatic stay of arbitration under the agreement.

As a practical matter, then, meaningful opportunity to arbitrate claims under a contract the debtor successfully seeks to reject will be afforded only after section 1113's requirements have been exhausted and rejection is approved. Taken together, do the unaltered rationale of Bildisco and section 1113 leave intact prior authority that the duty to arbitrate survives rejection of an executory contract, including a collective bargaining contract? Most likely, if not ineluctably, yes.

IV

THE COMPATIBILITY OF BILDISCO, SECTION 1113, AND THE SURVIVAL OF THE DUTY TO ARBITRATE AFTER REJECTION

A. The Contractual Basis for Survival

1. The Separability of the Arbitration Agreement

A starting point for analysis is to view an arbitration provision itself as an independent contract within the parties' underlying agreement. Under federal law an arbitration clause in an ordinary commercial agreement generally is considered a "separable" contract. It survives as an obligation even if the main contract becomes unenforceable and, therefore, voidable. It follows from the separability doctrine, as one com-

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93. In re Midwest Emery Freight Sys. Inc., 48 Bankr. 566 (Bankr. N.D. Ill. 1985); In re Braniff Airways, Inc., 33 Bankr. 33, 34 (Bankr. N.D. Tex. 1983); In re Smith Jones Inc., 17 Bankr. 126 (Bankr. D. Minn. 1981); In re R.S. Pinellas Motel Partnership, 2 Bankr. 113, 117-18 (M.D. Fla. 1979); Transmarittina Sarda Italnavi v. Foremost Ins. Co., 482 F. Supp. 110, 115 (S.D.N.Y. 1979). Section 362, the automatic stay provision, was added by the Code in 1978. The legislative history indicated the stay was to apply to all "collection efforts" and arbitration was included in the examples of efforts which would be stayed. 2 COLLIER ON BANKRUPTCY § 362.04, at 362-28 (15th ed. 1985). See Pulliam, supra note 51, at 9 (quoting the legislative history). See also Haggard, supra note 77, at 718 n.96. Reflecting this, for example, is an internal policy of the American Arbitration Association (AAA) as described by a representative at its national office (March 25, 1985). He related that if, during AAA administered arbitration proceedings, notice is received that a bankruptcy petition has been filed involving a party, the AAA notifies the arbitrator and the parties that the proceedings are stayed.

94. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967); Westbrook,
mentator has said, that "[v]iewed as an independent contractual obligation of the parties, an arbitration agreement is a classic executory contract, since neither side has substantially performed the arbitration agreement at the time enforcement is sought."95

Upon filing of the bankruptcy petition, performance of executory contracts becomes a voidable obligation if the bankruptcy court approves a rejection request. As shown, the rejection creates a pre-petition claim for damages. The equitable relief of specific performance by the debtor, which otherwise may have been available for a breach of the particular contract, is precluded by approval of rejection. Nevertheless, as earlier indicated, courts often have enforced the duty to arbitrate after rejection, usually without reliance on the separability doctrine.

The doctrine provides only a conceptual basis for concluding that the promise to arbitrate survives the rejection of the underlying contract. It does not provide a basis for treating the arbitration agreement differently from other executory contracts for which rejection affords only a claim for damages. The distinctive features of an arbitration promise, however, is that injury for its breach is generally difficult to assess in damages. The availability in most instances of only nominal damages was a prime factor in the adoption of the modern rule that an agreement to arbitrate a future dispute is specifically enforceable.96 The commentator quoted above with regard to separability notes that this factor is a relevant consideration when the bankruptcy court is asked to exercise discretionary authority to enforce the duty to arbitrate contained in a commercial contract rejected by the debtor.97

That commentator emphasizes that the court's rejection authority is the highly discretionary authority to approve or to reject a particular contract. The bankruptcy courts apparently have not applied his reasoning that the separability of the arbitration agreement in the underlying agreement provides a basis for treating the agreements as two distinct executory contracts. Concededly, a rejection request is typically aimed at one or more executory contracts and at each in its entirety. Indeed, such a request must extend to all the contract's provisions since an executory contract cannot be rejected in part only.98 However, that limita-

95. Westbrook, supra note 53, at 623. Note, Interlocutory Appeal of Orders Granting or Denying Stays of Arbitration, 80 Mich. L. Rev. 134, 154 n.7 (1981); M. Domke, supra note 14, at §§ 8.01-.06. In Bohack, the Second Circuit thus stated that "[t]he agreement to arbitrate is itself a contract which creates rights and duties. . . ." 541 F.2d at 319. See also Drake Bakeries Inc. v. Local 50, American Bakery and Confectionery Workers, 370 U.S. 254, 262 (1962) ("[A]rbitration provisions . . . are meant to survive breaches of contract, in many contexts even total breach.").
96. Id. at 624.
97. Id. at 624-26.
tion is no impediment if the arbitration agreement is treated as a separate contract for rejection purposes. In that event, court approval of the usual rejection request may be treated as applicable only to the underlying contract itself.

Under the above analysis, rejection of the arbitration agreement would have to be additionally requested. Without that, its rejection would only be put in issue if the creditor-signatory asks the bankruptcy court to lift the automatic stay to permit arbitration of claims under the underlying agreement and the debtor opposes that request. The debtor's opposition is tantamount to a request for rejection of the arbitration agreement. As with any rejection request, the bankruptcy court must determine whether granting or denying that request would better serve the policies of the bankruptcy laws. Denying rejection would permit that particular creditor to have its claim liquidated by an arbitrator rather than by the bankruptcy court. The latter is the only forum generally available to other creditors who have no contractual arrangement for arbitration. But arbitral resolution of one creditor's claim does not necessarily pose a threat to other creditors or the bankrupt estate. As noted above, the court makes the final determination on the priority and collectibility of the award.

Beyond bankruptcy law concerns, the court must determine whether arbitration is consistent with other interests. As regards arbitration under rejected collective bargaining agreements, Bohack and its progeny speak quite clearly. Those cases recognize that a national policy strongly favoring enforcement of a commitment to arbitrate labor contract claims may override any alleged interference with the bankruptcy court's administration of the bankrupt estate. The imperatives of that policy may make reliance on the separability doctrine unnecessary. Separability provides, however, a contractual rationale for holding that the duty to arbitrate survives rejection of a labor contract.

2. The Obligation of a Successor Company to Arbitrate Claims Arising from the Predecessor's Expired Labor Contract: Wiley

The national policy favoring labor arbitration also operates when a business enterprise is restructured during the term of a collective bargaining agreement by means other than bankruptcy reorganization. There the consequences of the policy's application are akin to those of the separability doctrine. The acquisition of a business through purchase or merger does not of itself require the new owner to deal with the union which represents the employees of the predecessor company, even if the predecessor is party to an unexpired collective bargaining agreement. The statutory obligation to bargain under the NLRA generally arises only when the new owner is deemed a "successor employer" for statu-
tory purposes. This entails operation of the business in essentially the same manner as before, with the predecessor's employees retained as a majority of the new workforce.\footnote{99} Moreover, even a successor employer required to bargain with the incumbent union is not bound by the unexpired labor contract unless there is an express or implied assumption of that agreement.\footnote{100}

Different results flow, however, as regards the survivability under the federal labor laws of the contractual duty to arbitrate. In \textit{John Wiley & Sons Inc. v. Livingston},\footnote{101} Wiley merged with a much smaller publishing company that was under union contract, and hired the smaller company's employees. Since a majority of the newly constituted workforce was not hired from the smaller "predecessor" employer, the union did not demand bargaining rights from Wiley. Wiley had not assumed the union contract and did not continue several contract benefits. On behalf of the predecessor's former employees, the union demanded arbitration under the arbitration provisions in the contract. When Wiley refused, the union brought suit to compel arbitration under the contract, which expired shortly thereafter.

The Supreme Court found in \textit{Wiley} that there was a substantial continuity of identity of the business enterprise. The Court held that under the circumstances this was a sufficient basis for treating Wiley as a successor to the disappearing company and, therefore, that the duty to arbitrate the union's claim that certain contract rights were vested survived both the merger and the contract termination date.\footnote{102} The Court relied on the critical role of arbitration in effectuation of national labor policy, and stressed that a collective bargaining agreement is more than an ordinary contract, for "it is not in any real sense the simple product of a consensual relationship."\footnote{103} Granted, the duty to arbitrate was rooted in the expired labor contract. Enforcement of that duty was compelled, however, by a federal interest in preserving agreed-upon peaceful methods of resolving labor contract disputes, especially in the aftermath of a corporate restructuring in which the interest of the predecessor's employees had been neither represented nor pressed upon the successor.\footnote{104}

\footnote{100. \textit{Burns}, 406 U.S. at 291.}
\footnote{101. 376 U.S. 543 (1964).}
\footnote{102. \textit{Id.} at 551.}
\footnote{103. \textit{Id.} at 550.}
\footnote{104. \textit{Id.} at 549. In a case reaching the Court 10 years later the acquiring company similarly was not bound by the predecessor's labor contract, had no duty to deal with the incumbent union, and refused the union's demand to arbitrate claims under the contract. The Court held that the duty to arbitrate had not survived because, unlike \textit{Wiley}, there was no continuity of identity of the business enterprise. One of the primary reasons continuity was lacking was the retention of only a token
In *Bildisco* the parties compared a debtor-in-possession with a successor employer under *Wiley*. However, the Supreme Court rejected the reasoning that in bankruptcy proceedings a debtor-in-possession is a "new entity," with obligations similar to those of a successor employer under the labor statutes. The Court held that "it is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition. . . ." The difference is that the debtor is "empowered" by the Code to seek court approval to assume or to reject executory contracts.105 Among those who had advanced this view were informed commentators who stated as follows:

The filing of a bankruptcy petition does not substantially alter the fundamental nature of the business operation. At least initially, in most cases the employees continue to do the same work for an employer that is virtually indistinguishable from the employer who existed prior to the filing of the petition.106

It has been suggested by a labor and bankruptcy practitioner that the Court's acceptance of this view implicitly suggests that, notwithstanding the rationale of the Court's ruling in *Bildisco*, the debtor could be required to arbitrate claims under a rejected collective bargaining agreement, just as the Court had held in *Wiley* that a successor employer continuing the enterprise in substantially the same form may be required to arbitrate claims under the predecessor's expired contract with the union.107 That is a plausible but not inevitable reading of the Court's decision. Furthermore, as discussed below, a more pertinent analogy may be drawn.


In *Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionery Workers*,108 the collective bargaining agreement provided for arbitration of grievances. A few days after the contract expired, the company permanently shut down the business. The company rejected the union's claim that under those circumstances the employees were entitled to compensation under the contract's severance pay provisions even though the agreement had expired before the shutdown. The company also rejected the union's demand to arbitrate the severance pay claim, stating that its duty to arbitrate also terminated with the contract's expiration.

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The company's denial of any post-contract duty to arbitrate was rejected outright by the Supreme Court:

Our prior decisions have indeed held that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so. Adherence to these principles, however, does not require us to hold that termination of a collective-bargaining agreement automatically extinguishes a party's duty to arbitrate grievances arising under the contract. Carried to its logical conclusion that argument would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination. The same would be true if arbitration proceedings began but were not completed during the contract's term. Yet it could not seriously be contended in either instance that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum. Nolde concedes as much by limiting its claim of nonarbitrability to those disputes which clearly arose after the contract's expiration.\(^{108}\)

The dispute over severance pay arose after the contract's expiration, but the Court emphasized that the dispute "clearly [arose] under the contract."\(^{109}\) The principles established under Wiley, the Court stated, include the principle that the duty to arbitrate post-contract disputes "survive[s] contract termination when the dispute was over an obligation arguably created by the expired agreement."\(^{110}\) Whether the union made the severance pay claim before or after contract termination does not control the arbitrability of the claim. The parties had agreed to resolve all contract disputes through arbitration. "[I]n the absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract."\(^{111}\) Those reasons include the parties' expression in their contract of a "preference for an arbitral, rather than a judicial, interpretation of their obligations. . . ."\(^{112}\) In addition, "the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as a means of resolving disputes over the meaning and effect of collective-bargaining agreements."\(^{113}\)

The lower courts generally have given broad scope to Nolde's determination that the arbitration duty presumptively survives beyond the labor contract's term unless the contract shows a contrary intent.\(^{114}\) This

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108. Id. at 250-51 (citations omitted).
109. Id. at 249 (emphasis in original).
110. Id. at 252.
111. Id. at 252-53.
112. Id. at 253.
113. Id. at 254.
114. See, e.g., Federated Metals Corp. v. United Steelworkers, 648 F.2d 856, 859 (3d Cir. 1981); United Steelworkers v. Fort Pitt Steel Casting, 598 F.2d 1273, 1282 (3d Cir. 1979). Nonetheless,
is not surprising. The result in *Nolde* is substantially in accord with holdings regarding commercial contracts. Arbitration is generally required even though a commercial contract has expired, under the separability doctrine and the doctrine that contract disputes which arise during the life of a contract are subject to arbitration. Applying these doctrines to labor contracts merely carries them one step beyond the way they have been applied to commercial contracts. *Nolde* accomplishes this implicitly by holding that the duty to arbitrate collective bargaining agreement disputes may survive even as to disputes based on events after the contract's expiration. The result is to impose an arbitration duty generally not found under ordinary contract principles.

That result should not be viewed as anomalous. It is grounded in a collective bargaining agreement's creation of responsibilities which transcend normal contractual rights and obligations. The agreement is also a charter for parties to a federally sponsored and regulated relationship. One feature of the regulation is that the union's acquisition of a right to arbitrate on the employees' behalf over contract disputes works a surrender of the employees' right to strike over those disputes. Another feature is an express statutory declaration favoring adherence by both union and employer to agreed upon methods of dispute resolution. These features, emphasized in the *Steelworkers Trilogy*, mandate that all disputes arising from the contract fall within the contract's commitment to the arbitral process, except to the extent that the contract expressly or implicitly withdraws disputes from that process.

The interdependence between striking and arbitrating may subsist after the collective bargaining agreement expires. The NLRB has held that for statutory purposes a no-strike obligation survives as to disputes under the expired contract which the employer has a duty to arbitrate. As a result, the NLRB concluded, a post-contract strike by the union to resolve those disputes violates its duty to arbitrate and is not activity protected by the NLRA.

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116. See supra note 94. See also M. Domke, supra note 14, at §§ 9:00-05.

117. M. Domke, supra note 14, at § 9:01 (stating that "when a disputed transaction occurs after the expiration of the [commercial] contract, arbitration cannot be had.").

118. This may well explain why the Supreme Court apparently has only rarely relied on the separability and other contract doctrines in labor arbitration cases. See Drake Bakeries Inc. v. Local 50, American Bakery and Confectionery Workers, 370 U.S. 254 (1962). That omission may suggest that unions have rarely advanced the doctrines in awareness of their possible limitations.

ilar reasoning when a striking union brought suit against an employer to require post-contract arbitration. Those decisions have ordered arbitration when the strike was over another dispute for which arbitration was not required.\textsuperscript{120} A debtor-in-possession during bankruptcy proceedings may be subjected to a strike over disputes potentially subject to arbitration under a collective bargaining agreement which the debtor seeks to reject, as was the case in \textit{Bohack}.\textsuperscript{121} Moreover, rejection followed by the debtor's refusal to arbitrate subsisting claims may both trigger and legitimize resort to a strike.\textsuperscript{122}

Rejection of an executory contract relieves the debtor of only those performance obligations which mature after the date the bankruptcy petition was filed. This is equivalent to contract termination. As shown, this does not relieve a party of performance owed prior to termination. Similarly, the Code does not relieve the debtor of all post-petition contractual obligations. It simply limits the creditor/signatory to damage claims. In addition, rejection submits ultimate damage recovery to a claim priority system established by the Code. For these reasons, rejection should not affect the duty to arbitrate to any greater extent than expiration does under the principles discussed above.

\section*{B. The Effect of \textit{Bildisco} and Section 1113 on Survival of the Arbitration Agreement}

\subsection*{I. The Effect of \textit{Bildisco}}

As to survival of the duty to arbitrate, what, then, are the implications of Justice Rehnquist's statement in \textit{Bildisco} that a collective bargaining agreement becomes "immediately unenforceable" against the debtor when a bankruptcy petition is filed, and is "never ... enforceable again" if a rejection request is granted by the court?\textsuperscript{123} The statement

\begin{quote}
\textsuperscript{120} United Steelworkers v. Fort Pitt Steel Casting Div. Conval-Penn, Inc., 635 F.2d 1071 (3d Cir.), cert. denied, 451 U.S. 985 (1981) (employer ordered to arbitrate disputes under expired contract in spite of strike because no-strike obligation did not survive as to strike over nonarbitrable dispute, i.e., the union's new contract demands). \textit{See also} Geslewitz, supra note 115, at 236-37 (discussion of \textit{Fort Pitt}). \textit{See also} Drake Bakeries Inc. v. Local 50, American Bakery and Confectionery Workers, 370 U.S. 254, 255-56 (1962) (during contract term the duty to arbitrate survives even though union breached no-strike provisions); Local Union 721 United Packinghouse Workers v. Needham Packing Co., 376 U.S. 247 (1964).

\textsuperscript{121} 541 F.2d at 317.


\textsuperscript{123} \textit{See} supra notes 79-81 and accompanying text.
\end{quote}
cannot mean that either a petition or a rejection renders an executory contract nugatory, like a contract found illegal, for the opinion describes the procedures for collection of pre-petition claims based on the contract, including damages for the contract breach caused by the rejection.\footnote{See \textit{supra} note 74.}

The Court's discussion thus assumes the continuing existence of contract obligations. Implicitly, and more accurately, the Court was reasoning that upon filing of the bankruptcy petition future performance of the contract becomes conditioned on the debtor's assumption of it or the court's refusal to allow its rejection; however, if rejection is approved, the contract is treated as breached and terminated (therefore expired) as of the day before the filing of the petition. As demonstrated above, under settled principles a separable promise to arbitrate claims arising under an expired contract presumptively survives termination, especially as regards collective bargaining agreements subject to federal labor laws.

Additional reasons for reaching the above conclusion are implicit in the \textit{Bildisco} opinion. Rejection of a commercial contract is authorized as a matter of business judgment concerning the best interest of the bankrupt estate. Rejection of a collective bargaining contract is authorized in the interest of unburdening the estate when the equities favor the debtor. Rejection protects the estate by relieving the debtor of the contract's obligations which had not been performed. However, rejection does not require treating any executory contract as wholly unenforceable. This is surely so as regards the duty to arbitrate contract claims for which the debtor remains responsible. Any conceivable burden this obligation might impose is tempered by the discretion of the bankruptcy court to refuse to lift the automatic stay of arbitration which would endanger the estate and interested parties. It is also tempered by the court's authority to prioritize claims and thereby reduce or nullify an arbitrator's award.

There are other reasons for narrowly construing \textit{Bildisco}'s characterization of the status of an executory contract after filing of a bankruptcy petition. The theory of post-petition "unenforceability" was the rationale used to hold that Bildisco's post-petition modification of its collective bargaining agreement did not violate section 8(d) of the NLRA and that statute's bargaining requirements. The Court's opinion specifies that the contract becomes unenforceable "within the meaning of NLRA § 8(d)."\footnote{\textit{Bildisco}, 465 U.S. at 532.} This was deemed necessary because of that section's elaborate procedures governing modification and (in the event of a strike or lockout) cooling-off requirements. Those procedures come into play when a party seeks to "terminate or modify" a collective bargaining agreement. The Court concluded that requiring post-petition adherence to those procedures "would run directly counter" to the rejection-related
provisions of the Code "and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space."\[126\]

To avoid this conflict Justice Rehnquist developed the concept of post-petition unenforceability. That concept should be given narrow and not literal application. It was stated as the predicate for the Court's ultimate holding that the filing of the petition renders a labor contract immune from the modification and termination procedures of the NLRA. As noted above, however, that holding can rest wholly on the Court's implicit rationale that upon filing of the petition, performance of the contract is excused until bankruptcy court ruling on an assumption or rejection request. If rejection is permitted, the contract may then be treated as having expired.

So construed, Justice Rehnquist's construction of the Code's rejection-related provisions is not in conflict with pre-Bildisco decisions, such as Bohack, holding that the arbitration provisions of executory contracts, including collective bargaining agreements, survive a bankruptcy petition and rejection. A contrary interpretation of Bildisco would clash with a key element of national labor policy on the basis of Justice Rehnquist's apparently inadvertent formulation of an unnecessarily broad rationale for one of the Court's holdings. As one commentator has stated:

If, as Justice Rehnquist put it, the post-petition collective bargaining agreement "is not an enforceable contract" until formally accepted, and if only the Bankruptcy Court can adjust the rights of the parties flowing from the breach, the Court disturbed a cornerstone of contemporary labor law—the enshrined idea that it is for the arbitrator to say what the agreement means and to adjust the rights of the parties. . . .

It is not inevitable that the filing of the petition for reorganization demands ouster of the arbitrator and submission of all claims to the bankruptcy court. On the contrary, we are entitled to be skeptical that a tribunal created and equipped to adjust commercial conflicts can adequately adjust disputes that flow from nonperformance of the labor agreement. . . . How are the bankruptcy courts to estimate the value, for example, of a contractual right to funeral leave, or of assignment by seniority to a preferred day or evening shift, when that right has been lost by a worker with strong family ties? If the majority of the Court confronted and resolved those difficulties, it did so in a fashion that left no mark on its opinion.\[127\]

This is a cogent statement of why Bildisco's "unenforceability" doctrine should be given the narrow application described above. This position is supported in Bildisco itself, where the Court refused to condition rejection on a finding by the bankruptcy court that the debtor had bargained to impasse over contract modification. "[S]uch a requirement,"

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126. Id.
the Court said, "will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none."128

Furthermore, Justice Rehnquist derived the unenforceability doctrine from a shaky premise. It is true that claims based on a rejected contract must be treated as pre-petition claims; that they are liquidated by the bankruptcy court under its exclusive authority to administer claims; and, that suits against the debtor to enforce the contract are stayed. However, as shown, the bankruptcy court may lift the stay to permit liquidation in arbitration proceedings. The court may also permit continuation or institution of an independent court suit on the contract.129 Thus it is inaccurate to assume that after a filing of a bankruptcy petition and rejection an executory contract has no vitality. Any contrary inferences drawn from Justice Rehnquist’s opinion would not withstand scrutiny.130

2. The Effect of Section 1113

Section 1113, added to the Code by the 1984 Amendments, keeps a collective bargaining agreement in force unless and until the bankruptcy court grants a rejection request.131 Thus that section prohibits pre-rejection nonperformance of the agreement in reliance on Bildisco’s unen-

128. Bildisco, 465 U.S. at 534. In S.A. Mechanical, Inc., 51 Bankr. 130 (Bankr. D. Ariz. 1985), the bankruptcy court refused to resolve an apparent contention that modification of the collective bargaining agreement with the debtor was subject to interest arbitration under the agreement. The refusal cited Bildisco’s admonition that bankruptcy courts lack labor “expertise.” Id. at 132. It has been suggested that because applications for rejection implicate national labor policy they should be ruled on by the district courts under § 104 of the 1984 amendments. That section amends 28 U.S.C. § 157(d) to provide for district court ruling on matters involving both bankruptcy laws “and other laws of the United States regulating organizations or activities affecting interstate commerce.” See Note, Rejection of Collective Bargaining Agreements in Bankruptcy: NLRB v. Bildisco & Bildisco and the Legislative Response, 33 CATH. U.L. REV. 943, 958 n.72, 985 n.232 (1984).


130. In his partially dissenting opinion in Bildisco, Justice Brennan stated that “it is simply incorrect to suggest that the collective-bargaining agreement does not retain sufficient vitality after the bankruptcy petition is filed,” noting that courts have often described executory (commercial) contracts as remaining “in effect.” In his view, the petition “suspended” the labor agreement. Bildisco, 465 U.S. at 543-45 & nn.11-13 (Brennan, J., dissenting). In Bohack the Second Circuit stated that after filing of a bankruptcy petition a collective bargaining agreement does “exist” but is a “contract in limbo . . .” Bohack, 541 F.2d at 320. Moreover, rejection is deemed a pre-petition breach but “like any other unilateral breach of contract it does not destroy the contract. . . .” Id. at 321 n.15. As shown, a bankruptcy court has held that under the unenforceability doctrine of the Bildisco majority opinion rejection does not destroy the contractual duty to arbitrate grievances made before the bankruptcy petition was filed. In re Midwest Emery Freight Sys., Inc., 48 Bankr. 566 (Bankr. N.D. Ill. 1985). See supra note 81.

131. See supra text accompanying note 92. The only exceptions are when the debtor may make interim alterations in the agreement because the bankruptcy court has failed to rule timely on a
forceability doctrine. To that extent Congress clearly overruled Bildisco. Does section 1113 evidence, as well, a congressional intent to overrule any implication in Bildisco that the contract is wholly unenforceable after rejection—even as to its arbitration provisions? Once the bankruptcy petition is filed, post-rejection arbitration, as shown, may be the only meaningful way to invoke the agreement's arbitration provisions.133

There is no reference to arbitration in the legislative history. Therefore, it cannot be said that proponents of congressional action to overrule Bildisco drafted legislation also aimed at preserving the duty to arbitrate contained in a rejected labor agreement. This is understandable. The targeted Bildisco opinions focus on the permissibility of ignoring the obligation to maintain contract employment terms once the bankruptcy petition is filed. Labor's alarm over the Court's majority holding that as a matter of both bankruptcy and labor law the obligation immediately ceased obviously transcended future concern over survivability of the duty to arbitrate when an agreement is rejected. Nor was there an apparent basis for concern. After all, prior to Bildisco the courts generally had recognized that duty.

There was, therefore, no apparent congressional focus on post-rejection survival of the duty to arbitrate pre-petition contract claims. However, the enactment of section 1113 evidences a congressional intent to preserve adherence to labor agreements and to a collective bargaining process which includes arbitration. One bankruptcy court has observed that, "Congressional leaders intended that the revised rejection procedure of § 1113 should stimulate collective bargaining and limit the number of cases where a judge will have to authorize the rejection of a labor contract."134

Congress sought to restore reliance on the collective bargaining pro-

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132. Section 1113 now governs the requirements for post-petition modification of a collective bargaining agreement. Therefore, pre-rejection modification after bankruptcy court inaction or approval, supra note 131, could not be held an unfair labor practice by the NLRB. Congress also undoubtedly intended that modifications permitted by § 1113 are not subject to the notice and waiting requirements of § 8(d) of the NLRA. Moreover, whether the union and the debtor satisfy the minimal negotiating and bargaining requirements that are conditions to rejection approval apparently are matters exclusively for the bankruptcy court to resolve. However, § 1113 only establishes the prerequisites for relieving the debtor of the agreement. It does not relieve the debtor or the union of the bargaining obligations of the NLRA. Accordingly, unilateral action and other bargaining defaults not permitted by § 1113 should remain within the NLRB's jurisdiction to remedy. Note, supra note 128, at 955-61, 995 n.294, 995-99. But see White, supra note 8, at 1202 n.102; Pulliam, supra note 40, at 399-401; Gibson, supra note 129, at 329-35; Haggard, supra note 77, at 733-37.

133. See supra note 93.

cess and duly negotiated agreements, which had been eroded by Bildisco. Senator Kennedy stated that the intent of section 1113 is "to overturn the Bildisco decision which had given the trustee all but unlimited discretionary power to repudiate labor contracts and to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process." To the same effect were other remarks of Senator Packwood, who stated that the main purpose of section 1113 was to place "primary focus on the private collective-bargaining process and not in the courts."

The limited experience under section 1113 does not suggest that it will help to preserve the arbitral process by discouraging companies from seeking to reject collective bargaining agreements containing binding commitments to arbitrate claims under the agreement. Senator Packwood's prediction that section 1113 would reduce bankruptcy court approval of labor contract rejections thus appears to have been overly optimistic. The flow of reported cases involving rejection requests does not appear to have diminished. Statistical study after more experience under section 1113 may ultimately show a decrease. It may also show decreasing bankruptcy court hospitality to rejection requests. However, some commentators are forecasting that "the courts will continue routinely to reject collective bargaining agreements."

If the trends and forecasts described above are reliable indicators, the structured and expedited procedures afforded by section 1113 could possibly encourage precipitate employer decisions to seek relief from the costs of their labor contracts by resort to bankruptcy reorganization. That statutory system has two primary objectives. The first is to rehabilitate the debtor by altering the ratio between debts and assets. The second is to distribute assets in an authoritative and fair manner to maximize recovery by creditors. The first objective is advanced by granting relief from performance of burdensome executory contracts by rejecting them. The second objective is advanced by giving creditors the right to recover for damages resulting from the rejection breach. Often, however, the damages recovered will not fully compensate the creditors since the damage claim is subject to pro rata distribution under priorities.

applicable to general creditors. Nevertheless, the recovery permitted serves the purpose of preserving the bargain contained in the rejected contract.\textsuperscript{139}

That purpose is also served by survival of the bargained-for duty to arbitrate claims arising under the rejected contract. Survival of the arbitral duty minimizes the disruption of the collective bargaining relationship to which the debtor may still be statutorily bound. Lapse of the duty to arbitrate may serve no purpose other than to permit the debtor to exploit rejection to avoid a feature of a labor agreement that had no relation to financial rehabilitation or equitable treatment of creditors.\textsuperscript{140} The result of this avoidance would be bankruptcy court resolution rather than arbitration of losses sustained by breach of the provisions of a rejected labor contract. Those provisions may provide for arbitral resolution of disputes over wage levels, seniority, vacation pay, etc.—"the whole range of disputes traditionally resolved through arbitration."\textsuperscript{141} This would "eviscerate a central tenet of federal labor-contract law . . . that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance."\textsuperscript{142} The bankruptcy court's exercise of authority to enforce the duty to arbitrate would avoid this evisceration. Furthermore, it would give the court the benefit of an informed award without ceding any of the court's bankruptcy jurisdiction.\textsuperscript{143}

\textbf{C. Commercial and Labor Arbitration: A Common National Policy}

Time and again the Supreme Court has reaffirmed its support for enforcement of arbitration agreements contained in ordinary commercial contracts. It has based this support primarily on the national policy favoring arbitration mandated by Congress in the Federal Arbitration Act.\textsuperscript{144} The Court, as shown, recently expanded the reach of that mandate by holding that it is a federal substantive policy binding on the

\begin{itemize}
  \item\textsuperscript{140} See Pulliam, \textit{supra note 40}, at 399, quoting Sen. Packwood's statement that the pre-rejection modifications permitted under § 1113, \textit{supra note 131}, include only those "that are necessary to permit the reorganization." It is highly unlikely that the arbitration provisions in an agreement could fall into that category at any juncture.
  \item\textsuperscript{141} Allis-Chalmers v. Lueck, 105 S. Ct. 1904, 1915 (1985). \textit{See also} Ehrenwerth & Lally-Green, \textit{supra note 122}, at 967-68.
  \item\textsuperscript{142} \textit{Allis-Chalmers}, 105 S. Ct. at 1916.
  \item\textsuperscript{143} Since absent exceptional circumstances § 1113 preserves the enforceability of a collective bargaining agreement until the bankruptcy court grants a rejection request, \textit{see supra} note 131, a surviving duty to arbitrate would not be limited to grievances arising before the bankruptcy petition was filed. \textit{See In re Midwest Emery Freight Sys., Inc.}, 48 Bankr. 566 (Bankr. N.D. Ill. 1985). The duty would extend to all arbitrable claims arising under the agreement. This would include, of course, the damage claim for the rejection breach, which the Code designates a pre-petition claim. \textit{See} Berger, \textit{supra note} 81, at 692.
  \item\textsuperscript{144} \textit{See supra} notes 11-18 and accompanying text.
\end{itemize}
The Federal Arbitration Act is not, it would seem, directly applicable to labor arbitration in the federal sector. However, "it should not be overlooked as a guide for the courts in fashioning the body of [federal] law for labor arbitration." Several recent Supreme Court decisions under the Federal Arbitration Act afford guidelines relevant here. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the federal district court had refused to order arbitration under the Federal Arbitration Act because in an earlier and pending state court suit one of the parties was raising, among other things, the same issue of arbitrability. The Supreme Court held that the refusal to order arbitration was an abuse of discretion, even though the order would result in bifurcated proceedings in state and federal courts. The federal court's failure to order arbitration forthwith "frustrated the [Federal Arbitration Act's] policy of rapid and unobstructed enforcement of arbitration agreements." Bifurcated proceedings occurred "because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement." The conclusion reached in *Cone* was deemed dispositive in *Dean Witter Reynolds Inc. v. Byrd*. There an investor filed a federal court suit against Dean Witter alleging violation of federal securities laws. The investor also sought monetary recovery under state law for breach of the parties' investment contract, which provided for arbitration of disputes under the contract. The district court, affirmed by the Ninth Circuit, denied Dean Witter's request for an order compelling arbitration of the pendent contract claims. Arbitration was denied on the ground that those claims were intertwined factually and legally with the federal security law claims which only the district court could decide. The Supreme Court reversed. Citing *Cone*, the Court held that the Federal Arbitration Act "requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possible inefficient maintenance of separate proceedings in different forums."

146. *See supra* notes 23 and 28.
147. F. Elkouri & E.A. Elkouri, *supra* note 28, at 26. *See also* M. Domke, *supra* note 14, at § 1:02. Conversely, Chief Justice Burger has stated that labor grievance and arbitration "developed over many years by labor and management—but with labor taking the lead—is in essence what American industrial and commercial leaders could adopt to their own internal litigation problems." Remarks before the American Arbitration Association and the Minnesota State Bar Association (August 21, 1985), 40 ARB. J. 6 (Dec. 1985).
149. *Id.* at 23.
150. *Id.* at 20.
152. *Id.* at 1241.
The Court distinguished cases barring arbitration, for example, of security and antitrust violations, since Dean Witter sought arbitration of claims under only the investment contract. Even though "piecemeal" litigation would result, "we [must] rigorously enforce agreements to arbitrate . . . to protect . . . the contractual rights of the parties and their rights under the [Federal] Arbitration Act." The Court rejected the argument that arbitration should be denied because the arbitrator's findings would have collateral-estoppel, or "preclusive," effect in the court suit on federal securities claims. It held that the trial court would be free to determine the extent to which the arbitrator's findings would be given preclusive effect consistent with federal interests. Accordingly, "there is no reason to require that the district courts decline to compel arbitration, or manipulate the order of the bifurcated proceedings, simply to avoid an infringement of federal interests."

The Supreme Court's recent decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. may be even more instructive. There the Court held that antitrust claims are arbitrable, pursuant to the Federal Arbitration Act, when the claims arise in an agreement covered by that Act and embodying an international commercial transaction. The Court invoked its earlier decision which upheld the arbitrability of federal securities claims arising in connection with international commercial transactions. The international setting enabled the Court to avoid a ruling on the legitimacy of the American Safety doctrine which the lower federal courts have cited in holding that antitrust claims arising from domestic commercial transactions are of a character inappropriate for enforcement by arbitration. Nonetheless, the Court questioned some aspects of that doctrine. It acknowledged that not "all controversies implicating statutory rights are suitable for arbitration." However, when that implication exists, "a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

The Court went on to say that "[h]aving made the bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights in issue."

153. Id. at 1242-43.
154. Id. at 1244.
156. Id. at 3355 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)).
157. Id. (citing American Safety Equip. Corp. v. J.P. McGuire & Co., 391 F.2d 821 (2d Cir. 1968)).
158. Id. at 3357.
159. Id. at 3355.
160. Id.
161. Id. The Court has not hesitated to find the above congressional intent where, in contrast to Mitsubishi, the arbitrator has been called upon to resolve a claim grounded on a significant statutory
Likewise, the promise to arbitrate in a rejected executory contract may be fulfilled without endangering federal interests protected by the Bankruptcy Code. Indeed, this would seem to follow a fortiori in view of the residual authority of the bankruptcy court to subject the arbitration award to creditor priorities. The Code certainly evinces no congressional intent to insulate the debtor from the arbitral forum. To the contrary, the Code’s procedures expressly provide for resolution of claims by ad hoc arbitration agreements entered into during the bankruptcy proceeding.\footnote{162}

In Mitsubishi the Supreme Court also reiterated the federal standard which requires that doubts about the arbitrability of claims be resolved in favor of arbitration. That standard, the Court indicated, emanates from the Steelworkers Trilogy of labor arbitration decisions as well as from the Federal Arbitration Act.\footnote{163} The Court thus assumed the affinity between national policy as regards enforcement of promises to arbitrate in commercial agreements and a like policy as regards labor agreements.

**Conclusion**

From labor’s perspective the recession era’s tide of concession bargaining was aggravated by Bildisco, particularly by the unenforceability doctrine developed in the majority opinion. It appeared that under that doctrine the performance of duly negotiated collective bargaining agreements could come to a standstill with the mere filing of a bankruptcy petition. Labor interests converged on Congress in an apocalyptic mood. They successfully persuaded Congress to graft section 1113 onto the detailed and unrelated 1984 amendments to the Code. The section was a labor victory in a drama where labor’s purpose had been to insulate labor contracts, and in a real sense the collective bargaining process itself, from negation by employers requesting bankruptcy reorganization.

Whether that victory preserved the duty to arbitrate contained in a rejected contract will inevitably be submitted for judicial resolution. Ample reasons for preservation of the duty may be distilled from various right. For example, an arbitrator’s determination that an employer did not violate a contractual nondiscrimination clause does not bar a subsequent and independent employee court suit based on Title VII of the Civil Rights Act. Alexander v. Gardner-Denver, 415 U.S. 36 (1974). For “the specialized competence of [labor] arbitrators pertains primarily to the law of the shop, not the law of the land.” Id. at 57. In such cases this does not preclude invocation of the contract’s arbitration provision. Furthermore, the courts may, and generally have, upheld the arbitrator’s decision. Fowler, Arbitration, the Trilogy, and Individual Rights: Developments Since Alexander v. Gardner-Denver, 36 LAB. L.J. 173 (1985); Scheinholtz & Miscimarra, The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration, 40 ARB. J. 55 (June, 1985).

\footnote{162} Rule 9019; see supra notes 58-60 and accompanying text.

features of a national labor policy which as shown, is one of twin pillars which include a national policy to enforce commercial arbitration promises. Taken literally the unenforceability doctrine of Bildisco is in clear conflict with both of those policies. Upon analysis, moreover, the doctrine is of questionable validity under the bankruptcy laws. The doctrine also was formulated to support the narrow holding that after filing a bankruptcy petition, a debtor may unilaterally modify the terms of employment fixed by a labor contract. The substance of that holding was overruled by Congress' enactment of section 1113.

This may be an instance calling for the principle of Occam's Razor: when offered a number of different theories, prefer the simplest. Simplicity marks the accepted theory that an arbitration provision within a contract is a separable agreement which may be invoked even when the underlying contract may be avoided. Simplicity also marks the accepted theory that the arbitration provision may be invoked to resolve claims arising from a contract which has expired. These theories are interrelated and mutually supportive. Their contractual underpinnings are equally applicable to an arbitration provision in a contract rejected in bankruptcy. In some instances application of the theories may jeopardize interests protected by the Code. However, the bankruptcy court has discretionary authority to prohibit arbitration which threatens those interests. Restrained and discreet exercise of that authority is necessary to preserve the terms of the parties' bargain and the integrity of national labor and arbitration policies.  

164. This Article focuses on the accepted practice of permitting grievance/rights arbitration by contracting parties involved in bankruptcy reorganization proceedings. Two commentators have recently suggested that arbitrators should perform an additional and distinct function. They propose that the bankruptcy courts form a national panel of arbitrators to assist the courts in determining whether union and management have met their respective obligations, under § 1113, to make reasonable efforts to negotiate modifications in a collective bargaining agreement which the debtor seeks to reject. See supra notes 84-90 and accompanying text. This innovative proposal would not entail interest arbitration imposing a final settlement. Rather, the arbitrator would assist the bankruptcy court as a "fact-finder or advisory arbitrator, and . . . mediator." Roukis & Charnov, NLRB v. Bildisco & Bildisco and the Legislative Aftermath: A New Frontier for Arbitrators?, 41 ARB. J. 43, 48 (June 1986).